Cecilia Yiin Suk Kiong & Anor v Citibank Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 21NCVC-2–01 OF 2013
AZIMAH OMAR JC
12 SEPTEMBER 2014

Contract — Agreement — Sale and purchase agreement — Redemption statement contained condition that in case borrower had become and been declared bankrupt consent of Insolvency Department of Malaysia must be obtained — Failure to furnish instalment payments on loan — Whether condition justifiable in law — Whether first defendant fraudulently and/or wrongfully and/or in breach of statutory duty and/or negligently prevented redemption of property in course of sale and purchase transaction — Whether first defendant acted fraudulently and/or wrongfully and/or in beach of statutory rights and obligations as charges of property and/or negligently vis a vis plaintiffs

The first defendant had granted a financial facility to the third defendant and the said property was charged to the first defendant as security for the loan facility which was granted. The third defendant had agreed to sell the said property to the second plaintiff with the purchase price of RM500,000. Considering the existence of the charge over the said property, the sale and purchase agreement ('the SPA') was subjected to the property redemption from the first defendant. The first defendant had issued a redemption statement which contained a condition that in case the borrower had become and been declared a bankrupt, the said redemption statement or undertaking shall be subject to the consent of the Insolvency Department of Malaysia ('Insolvency Department') which must be obtained beforehand before the disposal or redemption of the said property. Until the last day for redemption, both the plaintiffs had not made any payment of the sum which was set for the redemption of the said property to the first defendant. On the third defendant's failure to furnish instalment payments on the loan to the first defendant, the first defendant had enforced its rights or statutory remedy on the said property by executing a redemption prohibition in accordance with the National Land Code. An order for sale was issued by the fifth defendant from the public auction conducted by the fifth defendant with the assistance of the fourth defendant's auctioneer, the second defendant had successfully purchased the said property with the purchase price of RM800,000. On the failure of the execution of the SPA which was entered into by both of the plaintiffs and the third defendant as well as the sale of the said property by the first defendant to the second defendant through the process of the auction which was conducted by the fifth defendant, both the plaintiffs had filed this civil action against all five defendants. In both the plaintiffs' statement of claim, they had alleged that

their failure to furnish payment of the redemption sum was caused by the defendant bank's fraudulent conduct and/or negligent act and/or breach of statutory duty. Both the plaintiffs had also alleged that the said defendant bank's conducts had caused both the plaintiffs to be unable to perfect the SPA, whereby the defendant bank although having knowledge of the transaction between both the plaintiffs and the third defendant, had wrongly sold the said property through the public auction to the second defendant without informing to the plaintiffs. The issues that arose for the court's consideration were: whether the condition contained in the redemption statement issued by the first defendant which required the plaintiffs and the third defendant to secure consent of the official assignee for the disposal and/or redemption of the property justifiable in law; whether the first defendant fraudulently and/or wrongfully and/or in breach of statutory duty and/or negligently prevent the redemption of the property in the course of the sale and purchase transaction between the plaintiffs and the third defendant; whether the first defendant wrongfully pursue an auction of the property without giving any due or proper notice to the plaintiffs and/or the solicitors; and whether the first defendant acted fraudulently and/or wrongfully and/or in breach of its statutory rights and obligations as charges of the property and/or negligently vis a vis the plaintiffs.

Held:

(1) At the time both the plaintiffs and their solicitors had accepted the redemption statement, they have also accepted all of the conditions set within it wilfully or without enunciating any dissatisfaction or objected that this condition is a condition devoid of legal justification. This ground was merely an afterthought on the reason that it was only raised after the failure of both the plaintiffs to confirm to the said redemption statement because of their non-payment of the redemption sum on the set date in the said redemption statement. Both the plaintiffs were represented by their solicitors who ought to have knowledge of the relevant laws on the matters of bankruptcy and charges (see para 13).

(2) The redemption statement had already been issued by the defendant bank. Both the plaintiffs had by their own volition accepted the said redemption statement. Both the plaintiffs were represented by their counsel and their counsel had never took to the attention of the defendant bank or made any objections at all against the terms set in the said redemption statement. In conclusion, the terms within the said redemption statement followed the agreed intention of both the plaintiffs and the defendant bank. The obligations of both the parties were vividly clear and the words in the redemption statement were clear and very specific (see para 27).

(3) Even if the solicitor for both the plaintiffs had realised that the time was too short and makes the payment impossible to be made on or before 26 December 2011, the logical and sensible course of action should have been that their solicitor should have applied for a fresh issuance of a new redemption statement or at least applied for an extension of time. As what was submitted by the defendant bank, there was a total absence of any evidence which indicated that both the plaintiffs or their solicitors had done anything to that effect. In fact, if the evidence of SP1 was examined, it was clear that SP1 had even admitted that she had not made any request for a fresh issuance of a new redemption statement (see para 40).

(4) The reply by the Insolvency Department in both the letters dated 8 February 2012 did not bear any effect anymore against the redemption statement which had already lapsed its term of validity and any facts which arose following the letters by the Insolvency Department becomes irrelevant and merely academical. There are no legal provisions which provide that when any chargee intends to execute or enforce its statutory rights the chargee is required to give notice to the plaintiffs or in other words, prospective buyers (see para 41).

[Bahasa Malaysia summary

Defendan pertama telah memberikan kemudahan kewangan kepada defendan ketiga dan hartanah tersebut telah dicagarkan kepada defendan pertama sebagai sekuriti untuk kemudahan pinjaman yang diberikan. Defendan ketiga bersetuju untuk menjual hartanah tersebut kepada plaintif kedua dengan harga belian RM500,000. Dengan mengambil kira kewujudan cagaran ke atas hartanah tersebut, perjanjian jual beli ('PJB') tertakluk kepada penebusan hartanah itu daripada defendan pertama. Defendan pertama telah mengeluarkan kenyataan penebusan yang mengandungi syarat bahawa dalam keadaan di mana peminjam telah menjadi dan telah diisytiharkan bankrap, kenyataan penebusan atau aku janji hendaklah tertakluk kepada persetujuan Jabatan Insolvensi Malaysia ('Jabatan Insolvensi') yang perlu diperolehi terlebih dahulu sebelum jualan atau penebusan hartanah tersebut. Sehingga hari terakhir penebusan, kedua-dua plaintif tidak membuat apa-apa bayaran untuk jumlah yang ditetapkan untuk penebusan hartanah tersebut kepada defendan pertama. Atas kegagalan defendan ketiga untuk membuat bayaran ansuran untuk pinjaman itu kepada defendan pertama, defendan pertama telah menguatkuasakan hak-haknya atau remedi statutori ke atas hartanah tersebut dengan melaksanakan larangan penebusan menurut Kanun Tanah Negara 1965. Satu perintah jualan telah dikeluarkan oleh defendan kelima dengan bantuan pelelong defendan keempat, defendan kedua telah berjaya membeli hartanah tersebut dengan harga belian RM800,000. Atas kegagalan pelaksanaan PJB yang dimasuki oleh kedua-dua plaintif dan defendan ketiga dan juga jualan hartanah tersebut oleh defendan pertama kepada defendan

kedua melalui proses lelongan yang dilakukan oleh defendan kelima, kedua-dua plaintif telah memfailkan tindakan sivil ini terhadap kesemua lima defendan. Dalam penyataan tuntutan plaintif-plaintif, mereka mendakwa bahawa kegagalan mereka untuk membuat bayaran untuk jumlah penebusan itu adalah disebabkan oleh perbuatan berunsur fraud dan/atau tindakan cuai dan/atau pelanggaran kewajipan statutori defendan bank. Kedua-dua plaintif juga mendakwa bahawa perbuatan defendan bank telah menyebabkan kedua-dua plaintif tidak dapat menyempurnakan PJB itu, di mana defendan bank meskipun mempunyai pengetahuan tentang transaksi antara kedua-dua plaintif dan defendan ketiga, telah menjual secara salah hartanah tersebut melalui lelongan awam kepada defendan kedua tanpa memberitahu plaintif-plaintif. Isu-isu yang timbul untuk pertimbangan mahkamah adalah: sama ada syarat yang terkandung dalam kenyataan penebusan yang dikeluarkan oleh defendan pertama yang memerlukan plaintif-plaintif dan defendan ketiga memperoleh persetujuan pemegang serah hak untuk jualan dan/atau penebusan hartanah itu adalah wajar dari segi undang-undang; sama ada defendan pertama secara fraud dan/atau secara salah dan/atau telah melanggar kewajipan statutori dan/atau dengan cuai menghalang penebusan hartanah itu semasa transaksi jual dan beli antara plaintif-plaintif dan defendan ketiga; sama ada defendan pertama secara salah meneruskan lelongan hartanah itu tanpa memberikan apa-apa notis yang wajar dan patut kepada plaintif-plaintif dan/atau peguamcara; dan sama ada defendan pertama telah bertindak secara fraud dan/atau secara salah dan/atau melanggar hak dan obligasi statutorinya sebagai cagaran kepada hartanah itu dan/atau secara cuai berbanding plaintif-plaintif.

Diputuskan:

(1) Pada masa kedua-dua plaintif dan peguam cara mereka menerima kenyataan penebusan itu, mereka juga telah menerima bahawa syarat ini adalah syarat tanpa justifikasi undang-undang. Alasan ini hanya suatu yang difikirkan kemudian oleh sebab ia hanya ditimbulkan selepas kegagalan kedua-dua plaintif mengesahkan kenyataan penebusan tersebut kerana mereka tidak membayar jumlah penebusan itu pada tarikh yang ditetapkan dalam kenyataan penebusan tersebut. Kedua-dua plaintif telah diwakili oleh peguam cara mereka yang patut mempunyai pengetahuan tentang undang-undang relevan berhubung perkara-perkara kebankrapan dan cagaran (lihat perenggan 13).

(2) Kenyataan penebusan telahpun dikeluarkan oleh defendan bank. Kedua-dua plaintif telah menerima kenyataan penebusan tersebut dengan kerelaan mereka sendiri. Kedua-dua plaintif telah diwakili oleh peguam mereka dan peguam mereka tidak membawa kepada perhatian defendan bank atau membuat apa-apa bantahan langsung terhadap terma-terma yang dinyatakan dalam kenyataan penebusan tersebut. Kesimpulannya, terma-terma dalam kenyataan penebusan tersebut

mengikut niat yang dipersetujui oleh kedua-dua plaintif dan defendan bank. Obligasi kedua-dua pihak amat jelas dan kata-kata dalam kenyataan penebusan adalah jelas dan spesifik (lihat perenggan 27).

(3) Jikapun peguam cara bagi pihak kedua-dua plaintif menyedari bahawa masa begitu singkat dan menjadikan bayaran itu mustahil dibuat pada atau sebelum 26 Disember 2011, tindakan yang logik dan wajar dilakukan sepatutnya adalah di mana peguam cara mereka sepatutnya memohon keluaran baru untuk kenyataan penebusan atau sekurang-kurangnya memohon untuk lanjutan masa. Sebagaimana dihujahkan oleh defendan bank, ketiadaan langsung keterangan yang menunjukkan bahawa kedua-dua plaintif atau peguam cara mereka telah melakukan apa-apa bagi maksud itu. Bahkan, jika keterangan SP1 diperiksa, adalah jelas bahawa SP1 telahpun mengakui bahawa dia tidak membuat apa-apa permintaan untuk keluaran baru kenyataan penebusan baru (lihat perenggan 40).

(4) Jawapan dari Jabatan Insolvensi dalam kedua-dua surat bertarikh 8 Februari 2012 tidak mempunyai apa-apa kesan lagi terhadap kenyataan penebusan yang telah pun luput berdasarkan kesahannya dan apa-apa fakta yang timbul berikutan surat-surat itu oleh Jabatan Insolvensi menjadi tidak relevan dan hanya akademik. Tiada peruntukan undang-undang-undang memperuntukkan bahawa apabila mana-mana pemegang gadaian berniat untuk melaksana atau menguatkuasakan hak-hak statutorinya pemegang gadaian itu dikehendaki memberi notis kepada plaintif-plaintif atau dalam kata lain, bakal pembeli (lihat perenggan 41).]

Notes

For cases on sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6187–6191.

Cases referred to

Development & Commercial Bank Bhd v Government of Malaysia & Ors [1989] 3 MLJ 359, HC (refd)

Eng Ah Mooi & Ors v Oversea Chinese Banking Corp Ltd [1983] CLJ Rep 144, FC (not folld)

Ismail bin Mohamad v Haji Yahya & 8 Ors ; Ismail bin Mohamad v Mayah & 2 Ors [1988] 2 MLJ 185 (refd)

Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234, FC (refd)

Loh Seng Lee v Yunley Enterprise Sdn Bhd and another appeal [2009] 2 MLJ 242, CA (refd)

Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53, FC (not folld)
Mohd Nadir bin A Syed Ahamed & Ors v Zubaidi bin Abdul Hamid & Ors [1994] 2 MLJ 159, HC (refd)
United Asian Bank Bhd v Elgi Marka Sdn Bhd [1995] 1 MLJ 301, HC (refd)

Legislation referred to

Bankruptcy Act ss 8(2), 53(c)(1)
National Land Code ss 261(1)(c), 263, 418, Form 16D

Element Lopez (Lopez & Partners) for the first and second plaintiffs.
Alvin Julian (Ankit Sanghvi with him) (Shearn Delamore & Co) for the first defendant.
Rejinder Singh (Rejinder Singh & Partners) for the second defendant.
Hanif Khatar (Ahmad Shazali & Co) for the third defendant.
Legal Officer (Attorney General's Chambers of Selangor) for the fifth defendant.

Azimah Omar JC:

[1] The plaintiffs (a) Cecilia Yiin Suk Kiong, (b) Eric Basile Ting Chang Kai had filed this action against the five defendants in this court for 'inter alia' for the following orders:

(a) a declaration that the sale and purchase agreement dated 1 July 2011 entered into between the third defendant, as vendor, and the plaintiffs, as purchaser, is valid and specifically enforceable;

(b) a declaration that the order for sale dated 30 August 2011, the public auction held on 18 October 2011 and the contract entered into between the 1st defendant's solicitors on the first defendant's behalf, the second defendant, and the fourth defendant and fifth defendant is illegal, null and void ab initio, and of no force or effect whatsoever;

(c) that the first defendant shall pay damages to the plaintiffs;

(d) that the order for sale dated 30 August 2011, the public auction held on 18 October 2011 and the contract dated 18 October 2011 entered into between the first defendant's solicitors, the second defendant, the fourth defendant and fifth defendant be set aside altogether;

(e) a declaration that neither the second defendant nor any other person claiming any right or interest through the second defendant including but not limited to any financial institution is entitled to any right or interest in the property;

(f) the first defendant pay to the plaintiffs damages in addition to specific performance or in lieu thereof, with such damages to be assessed by the senior assistant registrar; and

(g) the second defendant be liable to the plaintiffs for all costs and expenses incurred by the plaintiffs in removing all caveats or other encumbrances entered by the second defendant or by persons claiming any purported interest through the second defendant (if any).

[2] The background of this case which derives from the agreed facts and oral evidences which was produced to the court during trial was as follows:

(a) the first plaintiff and the second plaintiff have a relationship with each other that of between an aunt and nephew;

(b) the first defendant (Citibank Bhd) is a banking and financing institution and is the chargee of a property held under H S(M) 7102, PT No 575, Mukim Damansara Bandar Sunway, Daerah Petaling Jaya, Negeri Selangor (the said property);

(c) the second defendant (Chin Lian Lian) is the purchaser of the said property through the public auction held on 18 October 2011;

(d) the third defendant (Phillip Yiin Chung Leong) who is the brother of the first plaintiff, and also the uncle to the second plaintiff, is the owner of the said property in which the ownership contains a restriction in interest whereby the property may not be transferred or charged without the consent of the state authority;

(e) the fourth defendant (Zulkarnain bin Abd Kadir) is the public auctioneer who conducted the public auction over the said property;

(f) the fifth defendant (the State Land Administrator of Petaling District) is the state land authority whereby the said property is located;

(g) the first defendant had granted a financial facility to the third defendant and the said property was charged to the first defendant as security for the loan facility which was granted;

(h) vide a sale and purchase agreement dated 1 July 2011 (the SPA) the third defendant had agreed to sell the said property to the second plaintiff with the purchase price of RM500,000;

(i) in carrying out the sale and purchase transaction of the said property, both of the plaintiffs had appointed Messrs P Rajasundram, Serene Tan & Assoc as their solicitors;

(j) considering the existence of the charge over the said property, the SPA is subject to the property redemption from the first defendant;

(k) on 27 October 2011, Messrs P Rajasundram, Serene Tan & Assoc had written a letter to the first defendant requesting for a redemption statement to be issued for the purpose of redemption of the said property;

(l) the first defendant on 28 October 2011 had issued a redemption statement (the said redemption statement) containing 'inter alia' the following terms and conditions:

(i) the said redemption statement shall be issued without prejudice to any of the right of recovery which the first defendant deems necessary against the third defendant;

(ii) the sum of redemption stated in the redemption statement shall be based on the assumption that the outstanding amount under the facility which was given shall always not be more than the total amount of the facility and monthly principal, interest and/or other payments shall be paid accurately and appropriately by the third defendant; and

(iii) the sum of redemption which is stated must be paid not any later than 3pm on 26 December 2011 and by implication the redemption statement shall be deemed to have lapse after 3pm on 26 December 2011.

(m) the said redemption statement which was issued by the first defendant also contains a condition that in case the borrower had become and been declared a bankrupt, thus the said redemption statement or undertaking shall be subject to the consent of the Insolvency Department of Malaysia (Insolvency Department) which must be obtained beforehand before the disposal or redemption of the said property;

(n) the solicitor for both of the plaintiffs in November 2011 had been informed that the third defendant had been made a bankrupt;

(o) until the date of 26 December 2011 which is the last day for redemption, both of the plaintiffs had not made any payment of the sum which was set for the redemption of the said property to the first defendant;

(p) on the third defendant's failure to furnish instalment payments on the loan to the first defendant, on 8 February 2012, the first defendant had enforced its rights or statutory remedy on the said property by executing a redemption prohibition in accordance with the National Land Code 1965; and

(q) an order for sale was issued by the fifth defendant on 30 August 2012 and on 18 October 2012 from the public auction conducted by the fifth defendant with the assistance of the fourth defendant's auctioneer, the second defendant had successfully purchased the said property with the purchase price of RM800,000.

[3] On the failure of the execution of the SPA which was entered into by both of the plaintiffs and the third defendant as well as the sale of the said property by the first defendant to the second defendant through the process of the auction which was conducted by the fifth defendant, both of the plaintiffs had filed this civil action against all the five defendants.

[4] For the purposes of this action, the plaintiffs shall be referred to as 'both of the plaintiffs' while the first defendant shall be referred to as 'the defendant bank'.

[5] In both of the plaintiffs' statement of claim, they had alleged that their failure to furnish payment of the redemption sum was caused by the defendant bank's fraudulent conduct and/or negligent act and/or breach of statutory duty.

[6] Both of the plaintiffs had also alleged that the said defendant bank's conducts had caused both of the plaintiffs to be unable to perfect the SPA, whereby the defendant bank although having knowledge of the transaction between both of the plaintiffs and the third defendant, had wrongly sold the said property through the public auction to the second defendant without informing to the plaintiffs, solicitors of the plaintiffs and the third defendant, and all the while had failed to give an opportunity to them to redeem the said property.

[7] Thus, both of the plaintiffs had pleaded the particulars of fraudulent/negligent conduct and/or breach of statutory duty of the defendant bank as follows:

(a) wrongly and without any justification putting a condition so that the plaintiffs obtain the consent of the receiving officer for the disposal and redemption of the said property under the SPA without taking into account the applicable provision with regard to the laws of bankruptcy.

(b) wrongly and without any justification ignoring the written reply by the Director General of Insolvency dated 8 February 2012 stating that as the said property is a charged property, it does not fall within the assets which could be called in and realised by the receiving officer in his capacity as the assets receiver and the third defendant on his bankruptcy.

(c) wrongly refused to allow both of the plaintiffs to make payment of the redemption sum according to the terms of the redemption statement.

(d) wrongly applied and obtained the order for sale from the fifth defendant, so that the order for sale over the said property was issued by the fifth defendant without the knowledge of the plaintiffs and without proper notice given to the plaintiffs, the said solicitors and the third defendant.

[8] The defendant bank, the second defendant and the fifth defendant had filed their defences disputing the claim of both of the plaintiffs against them. Meanwhile the third defendant although had filed his statement of defence, however his statement of defence not only on its entirety had admitted the statements contained in both of the plaintiffs' statement of claim, in fact had made a counterclaim against the first and second defendant as stated in paras 15 (a) until (i) of his statement of defence.

[9] The parties have agreed that the principal issues which must be tried before me are the following issues:

(a) was the condition contained in the redemption statement dated 28 October 2011 issued by the first defendant which required the plaintiffs and the third defendant to secure consent of the official assignee for the disposal and/or redemption of the property justifiable in law?

(b) did the first defendant fraudulently and/or wrongfully and/or in breach of statutory duty and/or negligently prevent the redemption of the property in the course of the sale and purchase transaction between the plaintiffs and the third defendant?

(c) did the first defendant wrongfully pursue an auction of the property without giving any due or proper notice to the plaintiffs and/or the solicitors?

(d) did the first defendant act fraudulently and/or wrongfully and/or in beach of its statutory rights and obligations as charges of the property and/or negligently vis a vis the plaintiffs?

(e) if so, do such breaches render the order for sale dated 30 June 2012 obtained by the first defendant tainted with fraud and/or illegality and/or in breach of the federal constitution and/or the National Land Code, and do they render the order for sale dated 30 June 2012 and the public auction carried out on 18 October 2012 pursuant to the said order for sale illegal, null and void and liable to be set aside by way of this action?

[10] In proving the case of both of the plaintiffs, the plaintiff herself (SP1) had given evidence while another two witnesses were called in whom they are SP2 (Agnes Yiin Choo Keong) who is SP1's sister, who is also the director of the

company Optima Line Sdn Bhd and who had issued the payment cheques to the third defendant by depositing it into the third defendant's account and SP3 (Serene Tan Pei Shen) a solicitor from Messrs P Rajasundram, Serene Tan & Assoc who had carried out the SPA on behalf of both of the plaintiffs.

Issue 1: Was the condition contained in the redemption statement dated 28 October 2011 issued by the first defendant which required the plaintiffs and the second defendant to secure consent of the official assignee for the disposal and/or redemption of the property justifiable in law?

[11] Learned counsel of both of the plaintiffs had submitted that the imposition of the specific condition that in case the borrower was declared a bankrupt, the redemption can only be executed after the consent of the insolvency department had been obtained by the defendant bank is a baseless condition devoid of any legal justification. Additionally, according to the counsel of both of the plaintiffs, the defendant bank as the chargee ought to have known and reasonably have known of s 8(2) of the Bankruptcy Act whereby this provision provides for the preservation of the rights or position of the chargor to deal or manage his securities even though the borrower had been made a bankrupt.

[12] The solicitor for the defendant bank firstly had replied that in the circumstance that the plaintiffs intend to apply the s 8(2) provision, this section must also be submitted against them, whereby both of the plaintiffs at all times were represented by their solicitors who reasonably should have known of the position of the said s 8(2) provision and the plaintiffs' solicitors should have brought this matter to the defendant bank's attention at the time they said redemption statement was received by them but instead they have failed to do anything to that effect. It is the submission of the first defendant that this issue raised by the plaintiffs is indeed merely an afterthought. Nonetheless, the defendant bank's solicitors continued to submit that the defendant bank hinges on the provision of s 53(c)(1) of the Bankruptcy Act which reads as follows:

> *Where a person who has sold*, purchased, leased, hired, supplied or received *property* of services, as the case maybe *becomes bankrupt* within *twelve months of that transaction, the court may*, upon the application of the Director General of Insolvency, *review the transaction and inquire whether the bankrupt gave or received fair market value in consideration for the property or services at the time of that transaction*.

THE COURT'S FINDINGS

[13] In this case it is undisputed and clear that the said condition had already been included in the said redemption statement. In this matter, I am of the considered view that at the time both of the plaintiffs and their solicitors had

accepted the redemption statement, they have also accepted all of the conditions set within it wilfully or without enunciating any dissatisfaction or objected that this condition is a condition devoid of legal justification. With all due respect, I am in agreement with the solicitor for the defendant bank that firstly, this ground is merely an afterthought on the reason that it was only raised after the failure of both of the plaintiffs to confirm to the said redemption statement because of their non-payment of the redemption sum on the set date in the said redemption statement. Both of the plaintiffs were represented by their solicitors who ought to have knowledge of the relevant laws on the matters of bankruptcy and charges.

[14] In this case, it is clear that according to the evidences, the third defendant had been made a bankrupt and this matter had only been informed to SP3 in November 2011 through one person alleged to be Ivan Ng, an officer under employment with the defendant bank. On this notification, SP3 consequently had written to the Director General of Insolvency through a letter dated 16 November 2011 to request for his consent for the disposal as per the conditions of the redemption of the said property in the said redemption statement. According to SP3, after failing to receive any reply from the Insolvency Department, she had written again to the Insolvency Department on 31 January 2012. The reply on the request of both of the plaintiffs through their solicitors had only been obtained from the Insolvency Department on 8 February 2012 whereby the reply of the Insolvency Department reads as follows:

(a) Pemegang gadaian bersetuju untuk serahkan hartanah kepada Ketua Pengarah Insolvensi (KPI) dan mereka boleh memfailkan tuntutan bukti hutang tetapi dividen akan dibayar secara *pari passu* dengan pemiutang-pemiutang lain; atau

(b) Pemegang gadaian mendapatkan perintah Mahkamah untuk menjual secara triti persendirian.

[15] In this matter, SP3 had given evidence that after receiving the letter from the Insolvency Department, she had communicated through telephone calls several times with the said Ivan Ng and was informed that the defendant bank does not allow the redemption of the said property.

[16] Learned counsel representing both of the plaintiffs had also submitted that the letter from the insolvency department dated 8 February 2012 had also been copied to the defendant bank and supposedly, the defendant bank should have known the position that it is on the defendant bank's discretion as chargee to approve this sale and not the Director General of Insolvency. Even though this matter is within the first defendant bank's knowledge, the defendant bank still entered to continue with the public auction proceeding over the said

property by instructing Messrs Azhar & Wong to fill Form 16D of the National Land Code.

[17] To me, from the evidences produced in this court, the issue regarding the necessity or non-necessity of the Insolvency Department's consent or the s 8(2) provision should not have risen at the time of this trial. I say this on the reasons that: Firstly, both of the plaintiffs are the parties who are thoroughly desirous to purchase the said property. They are represented by solicitors who reasonably should have sufficient knowledge on the transaction carried out. It is incumbent on the solicitors to give legal advice to both of the plaintiffs at the time the said redemption statement was received by the solicitors informing of the non-necessity of the condition to the defendant bank for their consideration. However, this was not done. Secondly, in fact, after knowing that the third defendant was made bankrupt, the solicitors immediately wrote a letter to the Insolvency Department requesting for the necessary consent. This conduct of writing indicates that despite the s 8(2) provision, both of the plaintiffs had accepted the said conditions by taking further actions. Thirdly, knowing that the plaintiffs have a time approximately one month before the term of redemption lapses, the plaintiffs instead opted to keep quiet, passively awaiting for the reply from the Insolvency Department until 31 January 2012 that they enquire on their letter dated 16 November 2011. The clear reality is that the date of the second letter to the Insolvency Department dated 31 January 2012 is already outside of the date of 26 December 2011. The reply letter from the Insolvency Department was received only on the next year in which was on 8 February 2012. At that point in time, the term of redemption had long already lapsed. There was no evidence at all from the plaintiffs' witnesses that they had taken any measures to communicate with the Insolvency Department enquiring on the status of their request and this, fourthly, indicates the lack of commitment and eagerness or zeal of the plaintiffs to actually execute the SPA.

[18] Now, only after the plaintiff had failed to make this redemption, on their own action and volition, they instead had put the failure onto the defendant bank by stating that the said condition was allegedly beyond justification or any legal basis. This statement should have been forwarded to the defendant bank from the outset when the said redemption statement was received by the plaintiff and not at this late a time. Allowing the plaintiff's submission would mean that this court is not adhering to the spirit of the said redemption statement, intention of the parties and what the parties had agreed in the said redemption statement. Thereto, the answer to the first issue is in the negative.

Issues 2: Did the first defendant wrongfully pursue an auction of the property without giving any due or proper notice to the plaintiffs and/or the solicitors?

Issues 3: Did the first defendant act fraudulently and/or wrongfully and/or in beach of its statutory rights and obligations as charges of the property and/or negligently vis a vis the plaintiffs?

Issues 4: If so, do such breaches render the order for sale dated 30 June 2012 obtained by the first defendant tainted with fraud and/or illegality and/or in breach of the Federal Constitution and/or the National Land Code, and do they render the order for sale dated 30 June 2012 and the public auction carried out on 18 October 2012 pursuant to the said order for sale illegal, null and void and liable to be set aside by way of this action?

[19] Learned counsel for both of the plaintiffs had submitted that according to the SPA which had been entered into by both of the plaintiffs and the third defendant, while obtaining the consent to transfer the said property from the state authority, both of the plaintiffs have the rights to claim to obtain an order for specific execution of the said SPA. For this contention, the plaintiffs' counsel had relied on the cases of *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 and *Eng Ah Mooi & Ors v Oversea Chinese Banking Corp Ltd* [1983] CLJ Rep 144.

[20] The plaintiffs had equated their rights to the same rights which was granted by the Federal Court to a chargor in the case of *Eng Ah Mooi* whereby it was held by the Federal Court that when a chargor had entered into a sale and purchase agreement with any party in which the proceeds from the said agreement was purposed to release the borrower from the financial facilities obtained and the bank had refused redemption on the ground that the agreement entered into by the parties was fraudulent, the Federal Court had held the following:

> [2]The respondent had no general lien to hold the charges for the sum due on the second account. It was clear from the arrangements between the chargor and the respondent regarding the two accounts that the parties did not intend a general lien. The charges on the land were for securing the overdraft due on the first account only.
>
> *Per Curiam*
>
> Under English Law a mortgagee or any person interested in the mortgaged property has the right to demand the mortgagee to redeem the mortgage on tendering the amount of debt together with interest thereon due on the mortgage ... We see no reason to hold that this rule of English Law is inapplicable to the present appeal.

[21] Learned counsel for the defendant bank in their submission in reply had submitted that both of the cases which were applied by counsel of both of the plaintiffs are inapplicable in the present case before this court. According to learned counsel for the defendant bank, the *Macon* case was in regards to the

A determination of rights of two prospective purchasers which have a better right. In both of the *Macon* case and *Eng Ah Mooi*'s case, both of the courts in those cases did not face any situation whereby the redemption statement had already been issued alike the present case before this court. Counsel for the defendant bank then submitted that the defendant bank had not at any time denied the B rights of the third defendant as chargor to make payments or settle the sums due in order to redeem the said property. In this case, according to the counsel for the defendant bank, they had never at any time obstructed or refused the chargor's application to enter into any SPA for the purpose of paying the overdue sums and consequently release the charge. In fact, when the second C counsel for both of the plaintiffs, P Rajasundram, Serene Tan & Assoc had written a letter in p 133 Volume B1 to the defendant bank for the issuance of the redemption statement dated 27 October 2011, immediately on the following day on 28 October 2011, the defendant bank had issued the D redemption statement to both of the plaintiffs. What was raised by the first defendant in contesting both of the plaintiffs' action is premised on the fact that the redemption statement which was issued by the defendant bank contains terms which are clear and express which should be complied by both of the plaintiffs.

E

[22] The terms in the said redemption statement is reproduced below for the convenience of understanding the terms set in the said redemption statement.

Cecilia Yiin Suk Kiong &

F Erich Basile Ting Shang Kai

No. 653, Lorong 1A1

Jalan Bayor Bukit

Tabuan Jaya Barat Fasa 3

G 93350 Kuching Sarawak

WITHOUT PREJUDICE

Dear Sirs,

Re Loan Account No : 70102000051849

H Property : H.S. (M) 7102 PT 575 Mukim Damansara, Daerah Petaling, Negeri Selangor bearing postal address of No. 11, Jalan PJS 7/7M, Bandar Sunway, 46150 Petaling Jaya, Selangor.

Borrower(s)/Vendor(s) : Philip Yiin Chung Leong

I Purchaser(s) : Cecilia Yiin Suk Kiong & Erich Basile Ting Shang Kai

---

We refer to the above matter,

We wish to advise that the redemption sum payable to redeem the aforesaid Property only is as follows:-

If settled on/before 3.00 p.m.	on	25/11/2011	RM 265,110.98
If settled on/before 3.00 p.m.	on	26/12/2011	RM 266,509.22

The redemption cheque(s)/banker's draft(s)/cashier's order(s) must be:

(i) made payable to 'CITIBANK BERHAD (PHILIP YIIN CHUNG LEONG / 70102000051849)' and we shall be entitled at our sole and absolute discretion to reject and/or to refuse to accept any cheque(s) which is made payable to 'CITIBANK BERHAD' only or in any other manner.

(ii) received by our *Banking Collections Department at Level 8, Menara Citibank, No. 165, Jalan Ampang 50450 Kuala Lumpur on or before 3.00pm (Monday to Friday) on the aforesaid stipulated dates*.

This letter of redemption is issued on a without prejudice basis to any right of recovery we deem necessary against the Borrower(s). Upon receipt of the redemption sum in full, we shall undertake:

(a) to execute the Discharge of Charge/Receipt and Reassignment in respect of the above Property and to forward and/or cause to be forwarded and or released the Discharge of Charge/Receipt and Reassignment together with the Original Document of Title/Duplicate Charge/Original Sale and Purchase Agreement/Loan or Facility Agreement(s)/Deed(s) of Assignment/Power(s) of Attorney and all other security document(s) in respect of the above Property to you/your solicitors, as the case may be; and

(b) to refund the redemption sum (without interest) paid to us in the event that the Discharge of Charge/Receipt and Reassignment is and/ or cannot be registered/ perfected due to any reason(s) attributable to us only provided that the Discharge of Charge/Receipt and Reassignment is duly presented for registration/perfected with the relevant land office/high court within thirty (30) days from the date of receipt of all relevant documents mentioned in para (a) above and provided always that all security document(s) and other relevant documents are returned to us by you/ your solicitors/ the relevant authorities with our security interest therein intact.

PROVIDED ALWAYS that we shall not be held responsible or liable in any manner whatsoever and/ or under any circumstances whatsoever for any delay in the preparation, execution, release to you/ your solicitors, presentation for registration and/ or registration of the said documents referred to in sub-paragraphs (a) and (b) above and other relevant documents (if any) howsoever caused (including but not limited to by reason of any act, mission or negligence on our part) or for any and/or all consequences arising from any such delay irrespective of whether or not we shall have or be deemed to have knowledge or shall have been given notice of such consequences or of any deadlines and any attempt by you/ your solicitors or any other person whomsoever to impose any such responsibility or liability on us shall be void and unenforceable and of no effect.

TAKE NOTICE that the above redemption sum is based on the assumption that

the amount outstanding under the facility will continue not to exceed the said current approved principal amount of the facility and that the monthly principal and/ or interest and/or other payments undertaking(s) shall also be subjected to and conditional upon the following terms and condition:

(a) the above redemption sum does not include additional legal costs and/or charges or any other fees that may be incurred in respect of this loan.

(b) after the issuance of this letter, and pending receipt of the full redemption sum, the Borrower(s) shall be liable to continue to pay/service to us the monthly instalments due promptly and regularly. Any payments or expenses made by us on behalf of the Borrower(s) will be added on to the said redemption sum. Should there be any variation in the interest rate(s) and/or Base Lending Rate(s), the redemption sum will adjusted accordingly. We reserve the right to request and/ or demand from the Borrower(s) for additional monies in the event that the redemption sum is insufficient to settle all sums due to us at the time of settlement. Any excess payments will be refunded to the Borrower(s) at our discretion accordingly.

(c) we further reserve the right at any time and at our absolute discretion and without notice to the Borrower(s) to combine or consolidate all or any of the Borrower(s)' facility(ies) and/or accounts including accounts jointly with others (of any nature whatsoever whether subject to notice or not) wheresoever situate with any liabilities and obligations owed or incurred by the Borrower(s) to us and set-off or transfer any sum(s) standing to the credit of any one or more of such accounts in or towards satisfaction of money(ies) obligations and liabilities due and payable to us.

(d) this redemption statement is issued on a WITHOUT PREJUDICE basis to any of our rights to recovery or to institute whatever legal proceedings against the Borrower(s) which may already be instituted and/ or which we deem necessary that the above mentioned redemption sum shall be payable latest by the last date as stated above.

(e) if settlement is by way of cheque(s), payment should be made in advance to enable clearance within the stipulated time.

(f) the redemption sum shall be deemed to have been received by us only upon our actual receipt of the proceeds.

(g) we reserve the right to amend the terms and conditions herein and/ or withhold/impose additional terms and conditions other than those abovementioned should we find it necessary for the recovery of all the sum due and owing under the Facility Agreement.

(h) all costs of and incidental to the Discharge of Charge/Receipt and Reassignment and/or the redemption of the Property from us are to be borne solely by the Borrower(s)/Vendor(s)/Purchaser(s).

(i) a letter of authorization (in such form and substance acceptable to us) is required for the collection of the relevant documents from us.

For timely processing, kindly adhere to the following:-

(1) kindly forward the Deed of Receipt and Reassignment of Discharge of Charge Form (Form 16N) together with the cheque payments for redemptions.

(2) For deed of Receipt and Reassignment, please include the property particulars on the signature page of our Borrower(s)/Vendor(s) and the Bank's Power of Attorney as below: -

'This is execution page of the Receipt and Reassignment dated____ day of ____ 200 ____ executed by Citibank Berhad (297089-M) in favour of _____ (borrower(s) names/s & NRIC No.) in respect of property known as _____ (Parcel No. / Lot No. / Suratan Hakmilik Sementara / Geran .....) and now bearing assessment address No. _____ (address)'

Please note that this redemption statement is valid until 26/12/2011 after which a fresh notice is required and we reserve the right to levy additional charges for the issuance of redemption statement.

In the event the Borrower(s) is adjudged a bankrupt, this redemption statement cum letter of undertaking is subject to the consent of the Official Assignee being firstly obtained for the disposal and/or redemption of the property. Emphasis added.

[23] It is the submission of the learned counsel for the defendant bank that there was never an instance of fraud, negligence or even breach of statutory duty on the part of the defendant bank in this case, as the plaintiffs themselves had already received the said redemption statement and ought to have the knowledge that the final date for the redemption falls on 26 December 2011. Therein, they also ought to have known that when the redemption term lapses and there are no application for fresh redemption, and furthermore the said redemption statement was issued without prejudice, it had not at all fetter the defendant bank's right to conduct any dealings over the security.

[24] Nonetheless when the defendant bank had commenced the procedure for public auction by issuing Form 16D dated 15 February 2012, the term for redemption had already long lapsed.

[25] The counsel for both of the plaintiffs had blamed the requirements for the consent of the Director General of Insolvency that had delayed their redemption process on their part and submitted that they were indeed ready to produce payment in order to settle the sum of indebtedness of the third defendant. SP1 in her evidence said that on 1 December 2011 she had issued a cheque to the name of the defendant bank for the sum of RM263,216 (p 143, Bundle B1) and had forwarded the said cheque to their solicitors for the purpose of settling the redemption sum. The insertion of this cheque was also supported by SP2, the sister of SP1 who is the Director of Syarikat Optima

Line Sdn Bhd in which was the company which had issued the said cheque. However, the payment was not made because she was informed by her solicitors that the defendant bank had refused the third defendant from releasing the said property. SP3, the solicitor for both of the plaintiffs in the meantime, through a telephone call with one, Ivan Ng had been informed that the defendant bank does not accept the payment made.

THE COURT'S FINDINGS

[26] Before I determine issues 2, 3, 4 and 5, it must be noted that in this present case, the cases of *Macon* and *Eng Ah Mooi* are inapplicable as in this case before me, both the plaintiffs and the third defendant were not denied of their rights to redeem the said property whereby the defendant bank had already issued a redemption statement dated 28 October 2011. Thus, in considering issues 2, 3, and 4, I would branch into two approaches. Firstly, determining the position of the redemption statement, second, determining whether or not the defendant bank had committed fraud and/or negligence or breached their statutory duty causing the obstruction of the intention of both of the plaintiffs and the third defendant to execute the SPA over the said property.

[27] The redemption statement had already been issued by the defendant bank. Both of the plaintiffs had by their own volition accepted the said redemption statement. As I have stated earlier and I reiterate here again that both of the plaintiffs were represented by their learned counsel and their counsel had never took to the attention of the defendant bank or made any objections at all against the terms set in the said redemption statement. Thus in conclusion, the terms within the said redemption statement follows the agreed intention of both the plaintiffs and the defendant bank. In this matter, the obligations of both of the parties are vividly clear and the words in the redemption statement are clear and very specific.

[28] In para 3, the redemption statement with the words written in bold letters stipulates that:

> If settled on /before 3.00 pm 25.11.2011 - RM265,110.98
>
> If settled on/before 3.00 pm 26.12.2011 - RM266,509.22.

[29] Both of these dates had been stated clearly and expressly that the redemption sum if paid on/before 3pm on 25 November 2011 amounts to RM265,110.98 and if the payment of the redemption sum is paid on/before 3pm on 26 December 2011 the redemption sum amounts to RM266,509.22 and if the said redemption sum is paid, the defendant bank shall perform its obligation encapsulated in the paragraph below which reads:

This letter of redemption is issued on a without prejudice basis to any right of recovery we deem necessary against the Borrower(s). Upon receipt of the redemption sum in full, we shall undertake:

(a) to execute the Discharge of Charge/Receipt and Reassignment in respect of the above Property and to forward and/or cause to be forwarded and or released the Discharge of Charge/Receipt and Reassignment together with the Original Document of Title/Duplicate Charge/Original Sale and Purchase Agreement/Loan or Facility Agreement(s)/Deed(s) of Assignment/Power(s) of Attorney and all other security document(s) in respect of the above Property to you/your solicitors, as the case may be; and

[30] Moreover, at the end of the said redemption statement, it had already been clearly stated that this redemption statement issued shall only remain valid until 26 December 2011 and thereafter from this date, a new notice is required with rights to charge additional levy for a fresh issuance of a new redemption statement.

[31] This court is of the considered view that the words in the said redemption statement is clear and express, that the defendant bank undertakes to perform its obligation to discharge the charge when a full redemption is made on the sums set on the dates for payment for redemption in which are RM265,110.38 if settled on/before 3pm on 25 November 2011, or RM266,509.22 if settled on/before 3pm on 26 December 2011.

[32] It is also an undisputed fact that neither of the sums of RM265,110.38 nor RM266,509 were paid by the plaintiffs. It is also clear that this redemption statement dated 28 October 2011 remains valid only until 26 December 2011.

[33] Both of the plaintiffs at the time of receiving the redemption statement were clear of the conditions set within it and ought to have known that the redemption sum must be paid to the defendant bank by 26 December 2011. Notwithstanding that, both of the plaintiffs had failed to make the payment by the final date of 26 December 2011. On their own failure to make this payment, both of the plaintiffs instead puts the defendant bank at fault on the following grounds:

(a) including a term which is devoid of justification or legal basis in which is the consent of the Insolvency Department.

(b) the defendant bank had refused to accept the payment from the plaintiff.

(c) the defendant bank had not considered the situation faced by both of the plaintiffs.

[34] The first ground had already been answered to earlier.

SECOND GROUND

[35] With regard to the second ground, both of the plaintiffs alleged that they were always at the ready to pay the defendant bank the redemption sum with the issuance of a cheque to the sum of RM263,216 dated 1 December 2011 and this cheque thereafter was handed to their solicitors for the purpose of payment of the redemption sum. The solicitors for the plaintiff had written to the Insolvency Department through their letter dated 16 November 2011. SP3 who is a lawyer, reasonably ought to have known that the final date for the redemption payment was on 26 December 2011. Notwithstanding that fact, SP3 had passively remained silent after 16 November 2011 when their letter was not replied to from the Insolvency Department. SP3 had only written their second letter on 31 January 2012 (p 149, Bundle B1) and enquired on the position of the application for consent whereas at the time this letter was made, the final date for redemption had already long lapsed by more than one month from 26 December 2011.

[36] Both of the plaintiffs in supporting the statement that they were indeed always prepared to make the redemption payment produced the cheque at page 143 Bundle B1 which is a RHB cheque dated 1 December 2011 with the amount of RM263,216. If it is indeed true that both the plaintiffs truly are eager to pay the said redemption sum before the lapsing of the final redemption date, as an eager and prudent prospective buyer, they must have known what is the actual amount which needs to be paid. A closer look at the cheque, it is clear that the cheque only holds an amount for RM263,216. This amount does not meet or reflect any of the amounts on the set dates. Even if the redemption was to be made before 25 November 2011, the amount to be paid would be RM265,110.98 and now on/before 26 December 2011, the amount to be paid would be RM 266,509.22. One irresistible is conclusion that the both of the plaintiffs do not even care sufficiently to consider the said redemption statement which was issued either on the set dates or even the amounts which had already been set.

[37] SP3 during re-examination by the counsel for both of the plaintiffs had been re-examined on the reason the amount in the said cheque was less than the set amounts prescribed on the two dates stipulated in the redemption statement. SP3's reply was that at the time the cheque was given to her, the amount written was the amount that the third defendant was informed to be overdue. The third defendant had known of the said amount from the bank. In actuality, this cheque was not issued on 1 December 2011 but on an even earlier date. The answer given, to this court's concern does not make any sense as the SPA which was entered into by both of the plaintiffs and the third

defendant is dated 1 July 2011. Thereafter from that, a number of payments were made by SP3 to the accounts of the third defendant up until the deposit on 28 September 2011 amounting to RM235,000 until leaving a balance of sale price of RM265,000. In taking into account that it is true the sale price of the said property is RM 500,000, if it is indeed true that the plaintiffs intended to execute the SPA, the cheque that should have been issued must be for a sum of RM265,000 or more than RM265,000 and definitely not RM263,000 or lesser. Additionally, the redemption statement was issued by the first defendant on 28 October 2011 and the said statement was served personally on the name of both of the plaintiffs who definitely would have known the actual redemption sum. Even more so when the cheque which was issued was dated 1 December 2011 and that on that date ie 1 December 2011, the redemption statement had already been in SP1's own possession.

[38] On this matter, my finding considering the said cheque is not a cheque issued on 1 December 2011, thus, it is not truly issued for the purpose of paying the redemption sum as was stated in the redemption statement. What is more baffling is that SP3 had already known of the said shortfall and knows that the final date for redemption is 26 December 2011 and despite that still informed that both of the plaintiffs will make an arrangement that when excess monies are needed, she will request to both of the plaintiffs to remit the said shortfall amount. In taking into account that time is of the essence, supposedly if the solicitor or both of the plaintiffs genuinely intend to comply with the redemption term, reasonably she should have asked both of the plaintiffs to pay the shortfall amount promptly or as soon as possible to her to be paid to the defendant bank.

[39] SP3 as the solicitor for both of the plaintiffs, was allegedly informed that the third defendant was declared a bankrupt in the middle of November 2011 by an officer of the defendant bank by the name Ivan Ng. What is perplexing is that SP1 and the third defendant are siblings and are also the parties who were interested to ensure that the SPA is finalised and realised. The third defendant himself allegedly did not know that he himself was declared a bankrupt while both of the plaintiffs were only informed of the third defendant's status by the officer of the defendant bank.

[40] Even if the solicitor for both of the plaintiffs had realised that the time was too short and makes the payment impossible to be made on or before 26 December 2011, the logical and sensible course of action should have been that their solicitor should have applied for a fresh issuance of a new redemption statement or at least applied for an extension of time. As what was submitted by the defendant bank's counsel, there was a total absence of any evidence which indicates that both of the plaintiffs or their solicitors had done anything to that

effect. In fact, if the evidence of SP1 is examined, it is clear that SP1 had even admitted that she had not made any request for a fresh issuance of a new redemption statement.

[41] In this matter, I respectfully am of the same thought with the counsel for the defendant bank that the reply by the Insolvency Department in both of the letters dated 8 February 2012 does not bear any effect anymore against the redemption statement which had already lapsed its term of validity and any facts which arose following the letters by the Insolvency Department becomes irrelevant and merely academical. This had even been agreed by the plaintiff's own witness, SP3, who herself is the solicitor who carried out the SPA.

[42] It is my judgment that it is utterly clear and express that from the evidences which had already been stated earlier that it is both of the plaintiffs themselves who had not performed their obligation under the redemption statement and had not complied with the conditions under the said redemption statement while brazenly putting the defendant bank and Ivan Ng.

[43] Consequently with regards to the continuance of the proceeding for public auction by the defendant bank, firstly, it is clear that in the redemption statement dated 28 October 2011, there exists a term of without prejudice that the defendant bank's rights to enforce its statutory rights on the said property shall not be deterred by the issuance of the redemption statement. Thus, this condition permits the defendant bank to proceed with any of its existing rights with regards to this charge.

> 'this redemption statement is issued on a WITHOUT PREJUDICE basis to any our rights of recovery or to institute whatever legal proceedings against the Borrowers) which may already be instituted and/or which we deem necessary and that the above mentioned redemption sum shall be payable latest by the last date as stated above'.

[44] Nonetheless, on the third defendant's failure to furnish monthly payments on the loan facility granted, the defendant bank had commenced the proceeding for public auction on 15 February 2012 by issuing Form 16D whereby on this date, the term for redemption had already lapsed. Counsel for both of the plaintiffs had submitted that the defendant bank is wrongful in continuing with this proceeding without making any announcement or giving reasonable notice to both of the plaintiffs.

[45] In this matter, I am in agreement with the submission of the counsel for the defendant bank that there are no legal provisions which provides that when any chargee intends to execute or enforce its statutory rights, the chargee is required to give notice to the plaintiffs or in other words, prospective buyers.

[46] Any of the statements by both the plaintiffs with regards to the execution of this order are baseless and there is no necessity for this court to consider. Nonetheless, as what was stated earlier, the third defendant in his statement of defence had in totality admitted the plaintiff's statements. Learned counsel for the second defendant had submitted that the third defendant had joined the bandwagon by filing a counter claim applying for the orders 'inter alia' for a declaration that the said order for sale is invalid in accordance with the law and is void ab initio and should be set aside on the ground that Form 16D was not served unto him, and disputes the decision which was made by the fifth defendant.

[47] One pertinent note that should be duly considered is that in the statement of defence of the third defendant, he had admitted paras 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 of the statement of claim of both of the plaintiffs.

[48] In the statement of claim of both of the plaintiffs, in para 21, the statement made was as follows:

> 21. Thereafter, despite full knowledge of the on-going transaction between the plaintiffs and the third defendant, the first defendant wrongfully proceeded to pursue an auction of the property without giving any due or proper notice to the plaintiffs, the third defendant or the solicitor.

[49] Besides this para 21, there are no other statements which states that the auction or order for auction was invalid or was not in compliance of the rules or law such as the non-service of Form 16D or other notices at all.

[50] However in this court, at the time the defendant bank and the fifth defendant had been cross-examined with regards to the service of Form 16D, the date of the order for auction was in actuality was not at all pleaded by both of the plaintiffs in their statement of claim. In this circumstance, I am of the considered view that the third defendant was not supposed to be allowed to raise these issues. Only on this ground, I find that there is no necessity for me to consider on the validity of the continuance of the proceeding for public auction. Nevertheless, from the evidence which was produced before this court, Form 16D had already been served to the third defendant and it is therefore my judgment that the order for sale and public auction which was conducted was in accordance with the law and is not at all tainted with any fraudulent conduct, negligence or breach of statutory duty on the part of the defendant bank or even the fifth defendant.

[51] For the conduct of third defendant, I am of the similar view with learned counsel for the defendant bank and second defendant that this court is not the proper forum for the third defendant to dispute the validity of the order

for public auction or the public auction which was held. If the third defendant intends to dispute the validity of the order for auction or public auction, the remedy which is opened to the third defendant is to appeal against the decision of the fifth defendant under s 418 of the National Land Code 'NLC'. This appeal should have been made within three months from the date of that decision was informed unto him. Reference is made to the case of *Mohd Nadir bin A Syed Ahamed & Ors v Zubaidi bin Abdul Hamid & Ors* [1994] 2 MLJ 159 in the matter of s 418 of the National Land Code, where parties who are aggrieved by the decision of the Land Administrator. The texts on this legal matter are utterly clear—see (a) *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234, (b) *Ismail bin Mohamad v Haji Yahya & 8 Ors ; Ismail bin Mohamad v Mayah & 2 Ors* [1988] 2 MLJ 185, (c) *Development & Commercial Bank Bhd v Government of Malaysia & Ors* [1989] 3 MLJ 359, (d) *United Asian Bank Bhd v Elgi Marka Sdn Bhd* [1995] 1 MLJ 301, (e) *Loh Seng Lee v Yunley Enterprise Sdn Bhd and another appeal* [2009] 2 MLJ 242.

[52] The law in this matter is very clear. The defendant bank had enforced its statutory right or remedy which is available to it against the chargor in which is the third defendant for the third defendant's breach for failing to furnish payments on the loan facility which he was granted. the proceeding for public auction was a conduct carried out by the first defendant over the charge over the said property and in considering whether the conduct of the defendant bank was appropriate, fair or reasonable, and whether this public auction can be carried out by the defendant bank, reference should be made to s 261 read together with s 263 of the NLC. According to s 261(1)(c) only the chargor during the enquiry who may show cause why the order should not be made. Read together with s 263 of the NLC, this provision stipulates that at the conclusion of the enquiry the land administrator who is the fifth defendant, may decide not to grant an order for sale if there is an existence of cause to the contrary. Thus, it is only the chargor who can prove or satisfy to the fifth defendant through the existence of prima facie facts of the existence of cause to the contrary that the defendant bank's conduct in commencing this proceeding was an unfair conduct, not in accordance with the rules, not in accordance with the spirit of the charge, and applies that the defendant bank's application for order for sale be set aside. However, both of the plaintiffs are not the chargor and are merely prospective buyers who have no involvement or co-relation at all with the charge between the defendant bank and the third defendant. Thus, the submission with regard to the necessity for the issuance of proper notice to the plaintiffs are mere statements which are devoid of any substance supported by any law.

[53] Therefore, any statements of both of the plaintiffs regarding the execution of the order for public auction or even the said public auction which was conducted is without any basis and does not bear with it any necessity for me to consider.

[54] The Third defendant indeed was not present at the date of the public auction was conducted and states that he was not served with any notice and that he was a bankrupt to react. I will consider this in the context of the third defendant as the chargor. The third defendant as I have stated earlier had admitted a large portion of the statements of both of the plaintiffs in totality.

[55] This order for sale was issued on 30 August 2012 and the public auction which had made the second defendant as the purchaser of the said property was conducted on 18 October 2012. Even at any time or date, the three months time had already lapsed. When the third defendant was cross-examined by the counsel for the defendant bank on why he had not appealed against the decision of the fifth defendant if he is dissatisfied with the fifth defendant's decision, he had answered that he was already made a bankrupt.

[56] Even so, he had admitted that he had not taken any measures at all to apply for the consent of the Director General of Insolvency to appeal against the decision of the fifth defendant. This admission explicitly indicates that the third defendant in actual fact had not at all intended to appeal against the decision of the fifth defendant and dispute the validity of the said order but had only attempted to capitalise on the action by the second plaintiff to gain some benefit for himself.

[57] A litigant's conduct such as the third defendant's conduct is a conduct that I cannot condone.

[58] Nevertheless, from the evidence, Form 16D had already been proven to be served to the third defendant.

[59] With the grounds laid down earlier, it is my judgment that the order for sale and public auction which was held is indeed in accordance with the law, and not at all tainted with any fraudulent conduct.

[60] With regard to the submission that the late payment of the full sale price by the second defendant, I am in agreement with learned counsel for the second defendant that the extension of time for payment does not raise any prejudice against any parties even against the third defendant. Moreover, the extension of time was required to enable the second defendant to settle the full payment of the purchase price of the said property. The order for extension which was granted by the High Court was not at all challenged by the third

defendant who indeed was not present in the said proceeding and now attempts to use this issue by stating that this delay taints the said public auction. In fact, this issue was not at all raised in the pleading of both of the plaintiffs or even the statement of defence of the third defendant.

[61] Even more so, the delay of the second defendant in making the full payment was caused by the caveat which was registered unto the said property by both of the plaintiffs themselves which consequently was ordered to be removed in the action No 24-1447-11 of 2012. In my view the delay was not a deliberate act on the part of the second defendant. Thus, the second defendant cannot be put at fault for the late payment which had already been approved by the court. With regard to the plaintiffs' demand and the third defendant's counterclaim against the fifth defendant, the court had earlier made a finding that the order for sale and the public auction which was held was conducted in accordance with the provision of the law and there was no element of fraud or even a breach of statutory duty on the part of the defendant bank and the second defendant. Thus, plaintiff's claim and the third defendant's counterclaim shall fail.

[62] On the grounds elucidated above, both of the plaintiffs had failed to prove their claim against the first defendant, the second defendant and the fifth defendant.

[63] Thereto, the plaintiffs do not reserve any right for any of the reliefs claimed in para 27 of their statement of claim. Similarly, the third defendant's counterclaim also fails. Thus, both of the plaintiffs' claim against the first defendant, the second defendant and the fifth defendant is dismissed with costs. The counterclaim by the third defendant against the first defendant, the second defendant and the fifth defendant is also dismissed with costs.

[64] On the grounds above, I am satisfied with the evidence produced in court, that it was the conduct of both of the plaintiffs themselves which had caused the failure of the execution of the spa and there is no existence of any fraudulent conduct, negligence or even breach of statutory duty on the part of the defendant bank.

AS TO THE ISSUE OF COSTS

[65] With regard to costs, I hereby order that both of the plaintiffs are to pay costs of RM20,000 each to the first defendant and the second defendant and to pay costs of RM5,000 to the fifth defendant. The third defendant is liable to pay costs of RM20,000 to the first defendant and RM10,000 to the second defendant. The third defendant shall also pay costs of RM5,000 to the fifth defendant.

Order accordingly.

Reported by Afiq Mohamad Noor